

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07/02/2004

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ.

CIVIL REVISION PETITION(P.D) NO.2285 of 2002

AND

C.M.P.NO.18983 of 2002

1. M/s.Keen Engineers rep. by
its Partner Mr.V.Venkateswaran

2. V.Venkateswaran,
S/o M.Venu,
Plot No.122, West End Colony,
Mogappair, Chennai-50. .. Petitioners

-Vs-

1. Mrs.Vijayalakshmi Jayaraman
2. Sudha Parvathi Jayaraman
3. Suvasini Neela Jayaraman. .. Respondents

Civil Revision Petition filed under Section 115 of C.P.C. as stated
therein.

!For Petitioners .. Mr.M.S.Mani.

^For Respondents .. Mr.K.Mani.

:O R D E R

The above Civil Revision Petition has been filed against the fair and
decretal order dated 3.12.2002 made in I.A.No.85 of 2002 in O.S.No.440 of 2001
by the Court of Subordinate Judge, Poonamallee thereby dismissing the
application filed by the petitioners herein under Order XII Rule 6 of C.P.C.
r/w Order XIV Rules 3(c),4,6 & 7 and Order XV Rule 1 of C.P.C praying to pass
an order to dismiss the above suit as not maintainable pursuant to specific
clause for Arbitration under the Indian Arbitration Act in terms of the Clause
23 of the suit document NO.1, dated 2.10.1987 and I.A.No.86 of 2002 praying
for an order of interim stay, on grounds such as that the impugned order and
the decretal order passed by the court below is erroneous and against the
weights of evidence and probabilities of the case; that the lower Court ought
to have seen that the suit document NO.1, is containing the Arbitration clause
23 and ought to have considered the same in its true sense of language, words

and phrases and terms thereof; that the Court below without applying its mind in considering the finding of this Court in respect of the Arbitration Clause 23 of the Partnership Deed by the learned single Judge of this Court in Original Application No.1946 of 2000 and the reasons for such finding.

2. Tracing the history of the case, what comes to be known is that the respondents have filed the above suit in O.S.No.440 of 2001 for partition and rendition of accounts of the 1st defendant firm; that originally the respondents herein filed a suit before this Court and this Court by its order dated 20.10.2000 made in Application No.1946 of 2000 has dismissed the Leave to Sue Application in an un-numbered suit with a finding of Arbitration clause in suit document NO.1 of the partnership deed vide Clause 23; that against the said fair and decretal order the respondents herein preferred an appeal before the Division Bench of this Court in O.S.A.No.53 of 2001 and the Division Bench of this Court by its judgment dated 24.4.2001, has dismissed the above appeal thereby confirming the fair and decretal order of the learned single Judge of this Court; that at the time of pronouncing the judgment, the learned counsel for the respondents herein has prayed eight weeks time for representing the plaint before the proper court and the Division Bench of this Court has granted eight weeks time as prayed for by the respondents herein.

3. The further case of the petitioners is that the petitioners herein have lodged a caveat on the file of the Court of Subordinate Judge, Poonamallee, for the purpose of raising the plea for maintainability of the suit, but the respondents herein by playing fraud, laid down the above suit without due notice after numbering the above suit, and obtaining an ex-parte commission order behind the back of these petitioners, in order to defeat the preliminary objections raised by the petitioners about the maintainability of the above suit and hence, the petitioners herein filed the above application in I.A.No.85 of 2002 in O.S.No.440 of 2001 praying to dismiss the suit, in terms of the Arbitration Clause 23 of the Partnership Deed and I.A.No.86 of 2002 praying for an order of interim stay.

4. In the counter affidavit filed by the respondents herein before the lower Court, besides generally denying the averments in the affidavit, they would submit that the arbitration clause applied only to the disputes between the partners and does not apply to the legal heirs of partner; that since the respondents are not the partners, the application is liable to be dismissed in limine; that since the petitioners have not filed their written statement, they can raise the same as preliminary issue and hence the respondents would pray to dismiss the above application.

5. The learned Subordinate Judge, based on the above pleadings would frame his own point for consideration and would discuss the same elaborately and would ultimately dismiss both the above applications by his common order dated 3.12.2002 made in I.A.Nos.85 and 86 of 2002 and only testifying the validity of the said fair and decretal order, the petitioners have come forward to file the above Civil Revision Petition on such grounds extracted supra.

6. During arguments learned counsel appearing on behalf of the

revision petitioners not only extracting Clause 23 of the suit document No.1, the agreement, but also the relevant portion from the judgment of the Division Bench of this Court wherein after pronouncement of the judgment 8 weeks time was granted as prayed for by the counsel for the appellant therein thereby justifying that the suit is maintainable and dismissing the appeal.

7. In the written arguments the learned counsel, extracting the other relevant aspects of the Arbitration Clause 23 of the partnership deed, would ultimately cite three judgments respectively reported in

(a) AIR 1970 SC 1147 (Khushal Khemgar Shab and others v. Mrs. Khorshed Banu Dadiba Boatwalla and another)

(b) AIR 1924 Privy Council 93 (Haji Hedayetulla v. Mahomed Kamal and others)

(c) AIR AIR 1959 MADRAS 283 (M.S.V.Narayanan Chettiar v. M.M.Umayal Achi)

and would ultimately pray to allow the revision petition.

8. In the first judgment cited above, the Hon'ble Supreme Court has held:

"In interpreting the deed of partnership, the Court will insist upon some indication that the right to a share in the assets is, by virtue of the agreement, that the surviving partners are entitled to carry on the business on the death of the partner, to be extinguished. In the absence of a provision expressly made or clearly implied, the normal rule that the share of a partner in the assets devolves upon his legal representatives will apply to the goodwill as well as to other assets."

9. In the second judgment cited above, it has been held:

"Where a partnership is dissolved by the death of a partner, and suit is filed for accounts, the business is to be registered as a continuing business up to the date of final decree."

10. In the third judgment cited above, it has been held:

"It is no doubt true that the death of a partner in most cases would dissolve the partnership. But that rule is subject to any contract to the contrary between the partners.

If the intention of the partners was that the death of one of them was not to result in the dissolution of the firm, such an agreement could be given effect to. In such cases the partnership as between the surviving partners will continue. There may also be cases where under the agreement of the deceased partner between the original partners the legal representatives of the deceased partner may be entitled to join in the firm in the shoes of the deceased partner. But the application of this rule will be difficult in the case of a firm composed only of two partners.

In that case if one of the partners died, there will not be any partnership existing to which the legal representatives of the deceased partner could be taken in. In such a case the partnership would come to an end by the death of one of the two partners, and if the legal representatives of the deceased partner joins in the business later, it should be referable to a new partnership between them."

11. In the Additional Written arguments submitted also the learned counsel would only reiterate those points which have been extracted in the main written arguments and would further lay emphasis on those judgments cited by the revision petitioners and extracting all those materials would only be a time consuming affair and hence this Court is of the view that they are not necessary to be extracted here and if it is discussed in a condensed form it would serve the purpose. The learned counsel would ultimately submit the following points:

(i) that under Sections 43 and 44 of the Partnership Act, the suit is not maintainable; that for rendition of the accounts suit is maintainable but Court says the legal heirs are not partners.

(ii) that Clause 2(g) of the Arbitration Act says only the party to the Arbitration Agreement could justify the validity of the acts of the petitioner.

(iii) that Clause 2(h) of the agreement is relevant for consideration but the judge says that the suit is only for rendition of the accounts and the L.Rs. are not parties to the agreement, the suit cannot be maintained.

(iv) that under Section 8 they have to file the application whereas they have not chosen to file such application. At this juncture, the learned counsel would cite a judgment reported in 2002(2) CTC 164 (M/s Gowri Spinning Mills Ltd., Thokkampatti, Dharmapuri rep. its Managing Director Vadivel and another v. Adimoolam and another) wherein it is held:

"This decision is referred to only for the purpose of showing that the rights and obligations of the shareholders under the arbitration agreement is not the same as the right of the company unless it is shown to be so. At this stage, it is not possible for the Court to come to a conclusion, that the agreement had been entered into on behalf of the company for referring the matter straightaway to arbitration. A juristic person, who is to a party to an arbitration agreement, cannot be compelled to go before the arbitrator in an application under Section 8 of the Act."

v. that as per the agreement any of the partners dying, automatically the firm gets dissolved, but the suit could be maintained after dissolution of the partnership and would cite another judgment reported in AIR 1977 Calcutta 130 (Nitya Kumar Chatterjee v. Sukhendu Chandra) wherein it is held:

"In view however of the law enunciated by the Privy Council in Rehmatunnissa's case (AIR 1917 PC 116) and of the provisions of Section 44, we are of opinion that the Court's jurisdiction in appropriate cases is not ousted by any provisions for arbitration in the partnership agreement. The exercise of such jurisdiction being a matter of judicial discretion in the context of attending circumstances, there can be no inevitability in the exercise of jurisdiction by a Court of law."

On such arguments, the learned counsel would pray to allow the above Civil Revision Petition.

12. On the contrary, on the part of the respondents they would not only submit the synopsis containing important points extracting Clauses 15, 16 and 23 of the Arbitration Agreement but also they would offer the dates and events connected to the claim of the respondents for division of profits and for rendition of accounts. They would also offer the particulars regarding

I.A.No.85 of 2002 and the order passed by the lower Court in I.A.Nos.85 and 86 of 2002, ultimately dismissing both the applications for reasons assigned and would ultimately pray to dismiss the above Civil Revision Petition.

13. The learned counsel would greatly rely on the fair and decretal order dated 3.12.2002 made in I.A.No.85 of 2002 and would sail along with the fair and decretal order which according to the learned counsel is a well merited and well considered order and therefore, would feel that the interference of this Court sought to be made into the said order is not at all required in the circumstance of the case and hence would pray to dismiss the above Civil Revision Petition.

14. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both what could be assessed in the whole of the exercise undertaken by the petitioners in filing the application in I.A.No.85 of 2002 in O.S. No.440 of 2001 on the file of the Court of Subordinate Judge, Poonamallee is that they have prayed to dismiss the suit as not maintainable pursuant to the specific Clause 23 of the suit document No.1, dated 2.10.1987 which is an agreement duly entered into in between the petitioners and the husband of the first respondent and father of the other respondents viz., Jayaraman thereby contemplating for arbitration under the Indian Arbitration Act for any dispute arising out of the partnership firm and therefore, the petitioners would lay emphasis on their stand sticking to Clause 23 i.e. Arbitration Provision made therein, in case of any dispute and would lay emphasis on dismissing the suit at that score.

15. The counter arguments of the respondents are to the effect that it is not necessary on the part of the parties only to resort to the arbitration clause in case of dispute, whereas for various causes of action arising under various circumstances suit could be resorted to in a civil forum and the circumstance that has arisen in the case in hand is one such contingency; that it could be filed only before a Civil Court for a valid decision to be rendered and therefore, filing of the suit is perfectly alright and just for the simple reason that for limited purpose the arbitration Clause is inserted into the agreement, it is absolutely not necessary on the part of the parties concerned with the affairs of the firm only to cling to the arbitration without seeking recourse to any other avenues open under any provisions of the C.P.C. and therefore, they would pray to dismiss the application filed by the petitioner before the lower Court.

16. The lower Court, having traced the pleadings properly and having considered the legal position in the manner required under law besides considering the facts and circumstances encircling the whole case, has rendered its fair and decretal order dismissing the application filed by the petitioners and it is only aggrieved against the said order passed by the lower Court, the petitioners have come forward to file the above Civil Revision Petition on such grounds extracted supra.

17. The main attack of the petitioners is the Arbitration Clause 23 inserted into the partnership agreement dated 2.10.1987 and while provisions

have been made for referring the matter for arbitration so as to find a finality of decision in accordance with the Arbitration and Conciliation Act, a suit cannot be filed as it has been resorted to by the respondents. The trial Court has given glaring instances drawing the sources from various judgments rendered by the upper forums of law thus ultimately establishing that it is not absolutely incumbent on the part of the parties always to recourse to the arbitration clause inserted in the partnership agreement and for various purposes suits could be filed and therefore, the suit is perfectly maintainable thus dismissing the petition filed by the revision petitioners herein. On a careful perusal of the fair and decretal order passed by the trial Court, this Court is able to see that the trial Court has meticulously gone into every aspect of the pleadings by parties and extracting the facts and circumstances therein and with due opportunity for both parties to be heard in full and having had a wide discussion on all the questions involved in the said application, has arrived at a valid decision to dismiss the application filed by the petitioners seeking dismissal of the suit in which this Court is not able to see any patent error or perversity in approach or any legal infirmity or inconsistency or lack of opportunity in passing of the order and therefore, the interference of this Court sought to be made into the fair and decretal order passed by the lower Court is neither necessary nor called for in the circumstances of the case and hence the following order: In result,

(i) the above Civil Revision Petition does not merit acceptance and it becomes only liable to be dismissed and is dismissed accordingly;

(ii) the fair and decretal order dated 3.12.2002 made in I.A.No.85 of 2002 in O.S.No.440 of 2001 by the Court of Subordinate Judge, Poonamallee is confirmed;

(iii) however, in the circumstance of the case, there shall be no order as to costs;

(iv) consequently, C.M.P.NO.18983 of 2002 is also dismissed.

Index:Yes

Internet:Yes

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